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Supreme Court of the United States

OCTOBER TERM, 1963

No. 16

BANCO NACIONAL DE CUBA,

Petitioner,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,

Respondents.

BRIEF FOR RESPONDENT FARR, WHITLOCK & CO.

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September 30, 1963.

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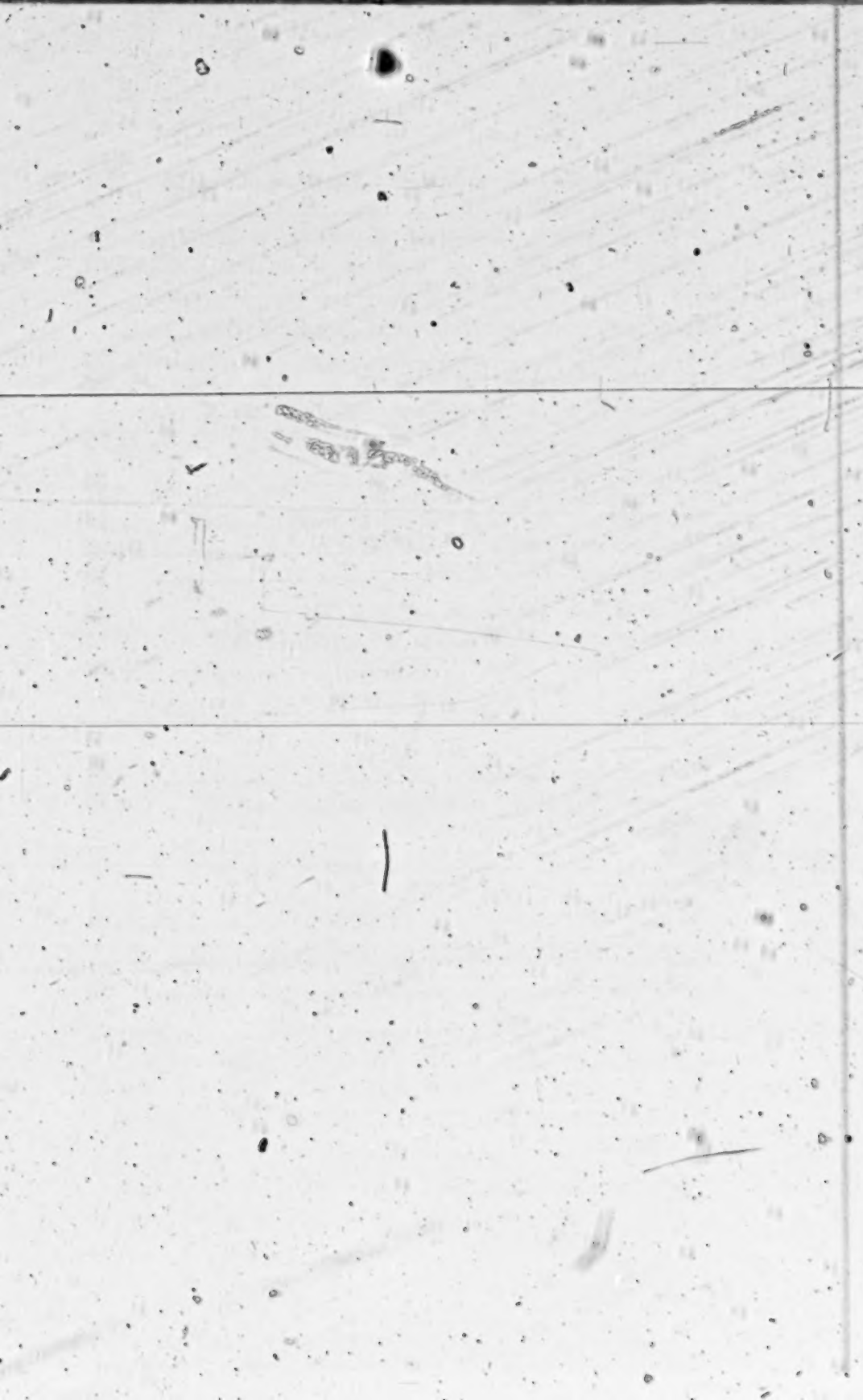

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Respondents.

BRIEF FOR RESPONDENT FARR, WHITLOCK & CO.

Statement of the Case.

This suit was brought by the Republic of Cuba acting by its Financial Agent, petitioner herein, against respondent Farr, Whitlock & Co., in the United States District Court for the Southern District of New York. Jurisdiction was based on diversity of citizenship.

The action expressly seeks to enforce a decree of that Republic confiscating *inter alia* the properties of Compania Azucarera Vertientes-Camaguey (hereinafter referred to as "C. A. V."). The action alleges the conversion by Farr, Whitlock of certain bills of lading for sugar confiscated from C. A. V. by the decree in question.

On cross-motions for summary judgment the District Court dismissed the complaint (R. 150). The Court of Appeals affirmed (R. 190).

The United States Government has filed a brief *amicus curiae* supporting petitioner.

In this Brief the word "Government", alone, refers to the Government of the United States. References to the Government of Cuba will expressly so indicate.

Emphasis has been added unless otherwise noted.

Division of Presentation Between Farr, Whitlock and C. A. V.

In order to avoid duplication and lessen the burden on Court and counsel, Farr, Whitlock and C. A. V. have attempted to apportion the presentation between them, although some overlapping could not be prevented. Farr, Whitlock adopts the arguments of C. A. V. on all issues not dealt with herein, in particular, those arguments showing that the Cuban decree violated international law and that this Court may so adjudicate.

Questions Presented.

We agree with petitioner that the case presents a fundamental question to which the other questions are subsidiary.

The fundamental question should, we believe, read as follows:

1. May the courts of the United States refuse to give legal effect to decrees of the Government of the Republic of Cuba, which decrees nationalized without compensation certain property, in a suit brought by an agency of that Republic to enforce and effectuate that nationalization?

The foregoing statement of the question differs from that posed by petitioner in that it notes that the nationalization was without compensation, that the suit is brought by the

Republic of Cuba and that its purpose is to effectuate the nationalization.

Subsidiary questions are petitioner's numbers 2, 3 and 4 and:

5. Assuming all prior questions are answered adversely to respondent Farr, Whitlock, did its refusal to pay the contract price after having negotiated the bills of lading amount to a conversion, as distinguished from a breach of contract?

Statement of Facts.

The relevant facts of the case are interwoven public and private events. We shall first summarize them and then state them fully with citations to the record and to public documents.

Summary: In the regular course of its business, respondent Farr, Whitlock bought two quantities of sugar from C. A. V. by separate contracts. Both contracts provided that the purchase price should be paid in New York.

Farr, Whitlock resold the sugar to a customer in Morocco. On August 6, 1960 the SS. *Hornfels* was loading a part of this sugar off the coast of Cuba for transportation to Morocco.

On that day, August 6, 1960, by an edict which breathes hatred for the United States in every line, the Government of Cuba confiscated "the property and enterprises [of C. A. V. in Cuba], and the rights and interests resulting from the exploitation of such property and enterprises".

The edict was in express retaliation for the action of the United States on July 6 and 7, 1960 in reducing the Cuban sugar quota for the balance of 1960 from 739,752 tons to 39,572 tons. It was, also by its express terms, applicable only to C. A. V. and other

corporations in which nationals of the United States had a predominant interest. The United States Ambassador made an "indignant protest" against this resolution as a violation of "International Law."

On August 8 and 9 the loading continued, but the Cuban authorities refused to permit the *Hornfels* to sail.

This refusal forced Farr, Whitlock, in order to meet its own contracts, to enter into new contracts with Banco Exterior (Cuban foreign trade agency) substantially identical, even to the dates, with those already made with C. A. V., and similarly providing for payment in New York.

Thus in effect the Government of Cuba confiscated a C. A. V chose in action located in New York.

The *Hornfels* was then permitted to sail. When the documents were presented in New York by the correspondent of Banco Exterior, Farr, Whitlock collected the proceeds from its customer but refused to pay the correspondent. Farr, Whitlock has, however, recognized an obligation to account to C. A. V. for this sugar.

Subsequently the United States broke diplomatic relations with Cuba.

The United States and Cuba are now hostile. Their Governments frequently express harsh and severe criticism of each other. According to a recent official statement the policy of the United States towards Cuba " is *not** coexistence. We want to get rid of Castro and Communist influence in Cuba."

Neither the United States nor its nationals have access to the courts of Cuba on the basis of any system of jurisprudence.

It is, we believe, sufficiently well recognized for judicial notice that the principal crop of Cuba is sugar; that the

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* Emphasis in original.

sugar is grown largely for export; that the proceeds of her sugar are Cuba's chief source of foreign exchange, and that under the Sugar Act of 1948, 61 Stat. 922, 7 U. S. C. §1100-1161, Cuba's sugar was sold in large measure to the United States on a quota basis and at a price generally higher than the world price.

On February 3 and July 13, 1960, Farr, Whitlock bought two quantities of sugar from C. A. V. (through a subsidiary). (R. 82).

Clause (7) in each of these contracts reads as follows (R. 82):

> "(7) Payment. To be made in New York, in New York current funds by net cash . . ."

On July 6, 1960, Congress, after widely publicized debates, amended the Sugar Act of 1948 so as to permit the President to reduce Cuba's sugar quota. 74 Stat. 330; 7 U. S. C. §1158.

There is no suggestion that C. A. V. or any owner of a Cuban sugar plantation did anything to promote the enactment of this amendment to the Sugar Act. Obviously the amendment was adverse to the interests of all Cuban sugar planters. Its effect was to reduce their market.

On the same day, July 6, 1960, the Council of Ministers of Cuba adopted "Law No. 851", providing in part:

> "WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban

sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process."

"ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriations, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban Laws."

Plaintiff's counsel has provided the foregoing under the certificate of Dr. Carlos Olivares Sanchez, Minister of Foreign Relations of Cuba. R. 97-99.

It appears from this certificate that Law No. 851 was "done at the Presidential Palace in Havana" by "Fidel Castro Ruz, Prime Minister" and others.

Law No. 851 purports to provide compensation for the expropriations which it authorizes. It is clear, however, that this compensation is illusory. The Court of Appeals so demonstrates. R. 176-181. Petitioner does not attempt to justify the nationalization on the ground that it provides compensation. Hence we shall treat the nationalization decree as naked confiscation.

So much for July 6, 1960.

On July 7, 1960 (at 8:56 A. M.) the President of the United States issued a proclamation under the authority

of the Act he had signed the preceding day. By this proclamation the President reduced the Cuban sugar quota for the remainder of the year 1960 from 739,752 tons to 39,752 tons, effective at once. Proclamation No. 3355, July 7, 1960, 25 Fed. Reg. 6414.

On August 6, 1960, sugar bought by Farr, Whitlock from C. A. V. by the agreements previously referred to was being loaded on the SS. *Hornfels* off the coast of Cuba at Santa Maria. R. 73.

On the same day pursuant to the authority of Law No. 851, the President and Prime Minister of Cuba issued Resolution No. 1. According to the same certificate of Dr. Carlos Olivares Sanchez, Resolution No. 1 provided as follows (R. 102-104):

> "WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America, of continued aggression, for political purposes, against the basic interests of the Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country, . . .
>
> "WHEREAS, the Chief Executive of the Government of the United States of North America, making use of said exceptional powers, and assuming an obvious attitude of economic and political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process . . .
>
> "NOW, THEREFORE: In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby,
>
> RESOLVE:
>
> FIRST: To order the nationalization, through compulsory expropriation, and, therefore, the adjudica-

tion in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, *owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest*, as listed below, to wit:"

There followed a list of 26 corporations, of which C. A. V. was one.

By including "rights and interests" Resolution No. 1 covered the contracts between Farr, Whitlock and C. A. V.

The loading of the *Hornfels* was completed on August 9, 1960, but the vessel was not allowed to sail (R. 74).

On August 9 in Washington the Department of State issued a press release of a note delivered the preceding day by the United States Embassy at Havana to the Cuban Ministry of Foreign Relations (R. 58-59). According to this press release, the United States Ambassador condemned Resolution No. 1, saying (R. 59):

> "Under instructions from my government, I wish to express to Your Excellency the indignant protest of my government against this resolution and its effects upon the legitimate rights which American citizens have acquired under the laws of Cuba and under International Law."

The Cuban Government, although not permitting sugar sold by pre-existing contracts to leave the country, did offer to release sugar if the contracts were rewritten with a Cuban governmental agency substituted as seller. Respecting other sugar the Cuban Government advanced the price twenty per cent. Farr, Whitlock, although called a broker, was already under obligation as principal to deliver the

sugar on the *Hornfels* (R. 75). In a legal sense a sugar broker might be more aptly described as a dealer.*

The Government is in error in saying that Farr, Whitlock "freely contracted with an agency of the Cuban government". Brief, page 23.

The Government perhaps means that the partners in Farr, Whitlock, being in New York, could not, unlike recalcitrants in Cuba, be subjected to arbitrary physical force.

But there was unlawful pressure nonetheless. Farr, Whitlock had as principal resold large quantities of sugar on purchase from United States owned Cuban planters. The shipment here involved was only one of a number of such purchases, involving millions of dollars. The Cuban Government in promulgating and carrying out the confiscatory decree denounced by the Department of State as a violation of "International Law" confronted Farr, Whitlock with enormous losses, if not ruin.

Under this duress Farr, Whitlock acquiesced in the substitution of Banco Para El Commercio Exterior de Cuba for C. A. V.'s subsidiary as vendor under the contracts of February 5 and July 13. The revised contracts were executed by Farr, Whitlock in New York on August 11 and by Banco Exterior in Havana (R. 75). The contracts, like their predecessors, provided for payment "to be made in New York, in New York current funds by net cash. . ." (R. 81).

Thus the effect of the confiscatory decree and the Cuban Government's procedure under it was that Banco Exterior acquired a chose in action whose situs was New York.

The *Hornfels* was permitted to sail on August 12. (R. 85). On August 29, 1960, the bills of lading were delivered

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* A sugar broker functions commercially like an ordinary broker, and receives what is called a "commission." However, a sugar broker usually, as happened here, takes full responsibility as principal in the buying and selling of sugar.

to Farr, Whitlock in New York by Banco Exterior's correspondent there, Societe Generale, a French bank. Farr, Whitlock in turn delivered these to its customer and obtained payment. R. 75-76. Later in that day, Farr, Whitlock was served with an order of the Supreme Court of New York restraining it from action which might remove from New York assets claimed by C. A. V. R. 76. Farr, Whitlock did not make payment or return the bills which, of course, it no longer had.*

At 1:20 A. M. on January 3, 1961 the Government of Cuba delivered to the United States Embassy in Havana a note requiring that within 48 hours the Embassy reduce its personnel to 11 people. Later that day the President of the United States issued a statement in which he described the event and continued (Department of State Bulletin of January 23, 1961; vol. 44, page 103):

> "This calculated action on the part of the Castro government is only the latest of a long series of harassments, baseless accusations, and vilification. There is a limit to what the United States in self-respect can endure. That limit has now been reached."

In consequence the President terminated diplomatic relations with Cuba that day.

Since the break in diplomatic relations the United States and Cuba have engaged in unfriendly acts and made the unfriendly statements reviewed in Point I and Appendix A.

What Was Confiscated Were the Contracts.

Both petitioner and the Government seem to assume that because the sugar was in Cuba, there is no question of extraterritorial application of the confiscatory decree.

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* There is some dispute over the exact events of August 29. R. 76-77. Unquestionably, however, there was a short period of time prior to the service of the Supreme Court order when payment was due under the terms of the contract, but not made.

But what Cuba wanted was the foreign exchange provided by sugar. Farr, Whitlock's executory contracts with C. A. V. provided for payment in New York in New York funds. The confiscatory decree was so worded as to include these contracts and the Cuban authorities so arranged matters that Farr, Whitlock was forced to substitute Banco Exterior as vendor. Thus Cuba, in substance, confiscated a New York chose in action.

In any event the decree and the contracts are so interwoven that it may fairly be said that petitioner's claim here is based on the decree. Indeed petitioner's complaint and Brief appear to recognize this fact.

Summary of Argument.

The fundamental difference between petitioner and respondent Farr, Whitlock is that petitioner seems to assume that it is the burden of Farr, Whitlock to show some satisfactory reason why the Cuban Government's nationalization decree and its consequent claim to the sugar and the proceeds of the sugar should not be enforced. In our view, Cuba having invoked this forum, is under an obligation to show that under the law of New York and of the United States the Court has jurisdiction of the subject matter, that Cuba is entitled to have the Court carry out its nationalization policy and decrees and enforce the contracts Farr, Whitlock was thereby compelled to make.

I.

First, we submit that the courts of the United States should not entertain suits by the Republic of Cuba or its agents, even if technical jurisdiction exists. Foreign sovereigns, even foreign corporations, may sue only by virtue of comity. The elements of comity, viz., friendship and reciprocity, are both lacking here.

II.

Even if entitled to sue, Cuba may not enforce its acts of state in our courts. Petitioner and the Government repeatedly refer to the "act of state doctrine". There is of course an act of state doctrine to the effect that the courts of one country will not attempt to adjudicate the acts of state of another country, although this doctrine has its exceptions. But there is an equally well-settled act of state doctrine that the courts of one country will not enforce the acts of state of another nation, or claims rested upon such acts of state. This case falls within the latter doctrine.

III.

Petitioner, having invoked the jurisdiction of the United States District Court for the Southern District of New York on a complaint asserting rights under the law of New York, is bound by that law. But the policy of the State of New York forbids confiscation. Comity yields to policy. Hence petitioner's claim may not be enforced under New York law. Further, international law is part of New York law, and as the nationalization decrees violate international law, they may not be enforced in New York.

IV.

In any event, what Farr, Whitlock did was not a conversion but at most a breach of contract. Under New York law, when property is transferred under a contract by which the transferee is authorized to exercise dominion over it, the exercise of that dominion contrary to the terms of the contract is not a conversion but a breach of contract. Suits alleging conversion under these circumstances are dismissed.

POINT I.

This District Court had no jurisdiction over the subject-matter of the action. Petitioner, suing as agent of an unfriendly foreign power in whose courts neither the United States nor its nationals can obtain relief, is not entitled to comity upon which jurisdiction depends.*

As this Court said in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134, a foreign sovereign may sue in our courts only as a "privilege . . . extended by comity".

Comity rests upon two facts, and both of them must exist: First, friendliness; second, reciprocity.

Friendliness. For the proposition thus stated in *Guaranty Trust Co.* the Court cited *The Sapphire*, 78 U. S. 164, 167, and *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255.

In *The Sapphire* the Court held the Emperor Napoleon III entitled to sue in a court of the United States because: "To deny him this privilege would manifest a want of comity and *friendly feeling.*" (page 167).

In *Russian S. F. S. Republic* v. *Cibrario* the Court said at 235 N. Y. 258:

> "Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. *It presupposes friendship. It assumes the prevalence of equity and justice.* . . . We do justice that justice may be done in return. . . . As defined by Webster comity 'is in general terms that there are between nations at peace with one another rights both national and individual resulting from the comity or courtesy due from one friendly

* Although this argument was not made in the courts below it is available here in support of the judgment. *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 434.

> nation to another. Among these is the right to sue in their courts respectively'. (6 Webster Works, 117)."

And in *Bank of Augusta* v. *Earle*, 13 Pet. 519, the Court at page 589 related comity to "friendly intercourse".

There is, of course, no friendliness between the United States and Cuba under the Castro Government. We have annexed in Appendix A excerpts from the Bulletin of the Department of State establishing this well-known fact. Thus our Ambassador to the United Nations on one occasion protested the "unbridled vituperation to which we have been subjected by the Castro delegation and its Communist colleagues". On another he referred to "unparalleled calumnies, slanders and misrepresentations". Ambassador Morrison has complained of Cuba's encouragement and support for "armed insurrection in other countries of the hemisphere." Assistant Secretary of State Martin has defined our policy towards the Castro Government as "*not** coexistence. We want to get rid of Castro and Communist influence in Cuba". *Infra*, pages 39, 40, 42. Other unfriendly statements are also quoted in Appendix A.

The United States organized, financed and equipped an invasion of Cuba by armed force, and Cuba provided the Soviet Union with sites for missile launching pads directed at the United States—unfriendly things to do.

Congress adopted a resolution in September, 1962 expressing hostile sentiments towards the present "Marxist-Leninist regime in Cuba". Appendix A, page 43.

The political branches of the Government have thus, in the most unequivocal fashion, shown a "want of friendly feeling" towards the present Government of Cuba. The judicial branch, in these matters, follows the political branches. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.

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* Emphasis in original.

We submit that this Court should not take action proper only on the hypothesis of a "friendly feeling" between the United States and Cuba when the political branches have shown so clearly that such feeling does not exist.

In *Russian S. F. S. Republic* the Court referred to the Emperor Maximilian as an illustration of the evil of permitting unfriendly governments to sue. 235 N. Y. 263. Certainly Castro is far more unfriendly and presents a far greater danger than Maximilian.

Reciprocity. Reciprocity as a requisite of comity was most fully discussed by this Court in *Hilton* v. *Guyot*, 159 U. S. 113, a case in which the plaintiff sought to enforce a judgment of the courts of France. There was, of course, no "want of friendly feeling" between the United States and France at that time (1895). The Court rested its conclusion to deny enforcement "upon the broad ground that international law is founded upon mutuality and reciprocity". (page 228).

One indispensable feature of comity, the Court said, was (page 202):

> "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries . . ."

The Court quoted a remark by Lord Eldon finding relevance, in respect to comity, in the fact that "persons suing under similar circumstances [in the courts of the other country] neither had met, nor could meet with justice . . ." (page 213).

The Court was satisfied that the administration of justice in France was fair to nationals of other countries. Nevertheless the Court decided to deny enforcement to the French judgment, saying at page 210:

> "... [T]here is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, *the want of reciprocity*, on the part of France, as to the effect to be given to the judgments of this and other foreign countries."

In the course of its discussion the Court quoted at page 213 with approval the following statement by Mr. Justice Story:

> "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice."

At page 214 the Court quoted with approval from Mr. Justice Cooley: "True comity is equality; we should demand nothing more, and concede nothing less." On the same page the Court quoted a statement by Mr. Justice Woodbury emphasizing, in respect of comity, "the reciprocal mode".

The Court then, after a careful review, established that in France foreign judgments were subject to revision. The Court concluded, referring at page 228 to "reciprocity", that the judgments of the courts of France were therefore subject to revision in our courts.

Hilton v. *Guyot* has been cited many times. Illustrative of references to friendliness and reciprocity are: *His Majesty's Government* v. *The Flying Arrow*, 97 F. Supp. 182 (S. D. N. Y.) ("Comity . . . is usually extended to those countries granting our nation reciprocal courtesies in their courts"); *The Junko*, 54 F. Supp. 241 (E. D. N. Y.) (Norway entitled to comity because "a friendly foreign government"); *Compania Mexicana* v. *Spann*, 41 F. Supp. 907

(N. D. Texas) (Mexican judgment entitled to comity because Mexico provides "reciprocity . . . It is a friendly nation . . . Each uses the courts of the other.")

Certainly the courts of Cuba would not be open to the United States, its agencies and nationals were they seeking the kind of relief petitioner demands here.

In *P & E Shipping Corp.* v. *Banco Exterior*, 307 F. 2d 415 (C. A. 1st), the Court of its own motion remanded the case to the District Court to determine from the Department of State "whether the United States or a national thereof would be allowed to maintain an action, similar to the one before us, in the courts of Cuba" (page 418). The action was a libel in admiralty for damage to a cargo of beans.

Responsive to this mandate the District Judge addressed an inquiry to the Department of State. Its answer is printed as Appendix B to this Brief, pages 45-46. According to the Department, "owing to the breakdown of the Cuban judiciary as an independent branch of the Government and its subservience to the policies of the executive even if local legal remedies theoretically exist under Cuban law, recourse to them by an aggrieved United States national would be futile" (page 46).

Thus the Department of State has in substance officially declared that Cuba does not now have "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries", to use the language of *Hilton* v. *Guyot*, and that United States nationals suing in Cuba "could [not] meet with justice", to use the language of Lord Eldon which this Court quoted with approval in that case, and that there is not in Cuba "prevalence of equity and justice", to quote *Russian S. F. S. Republic*.

If this situation exists regarding a dispute over damage to a cargo of beans, there can be no expectation that an effort to enforce an act of state would "meet with justice".

Thus there is a want of reciprocity in Cuba with respect to such actions as this. Indeed there cannot be the slightest doubt that an action in the courts of Cuba comparable to this one would be decided by executive fiat.

Recognition. Comity is not available to an unrecognized foreign power. Such powers therefore may not sue in our courts. *Russian S. F. S. Republic* v. *Cibrario*, 235 N. Y. 255, so holds, as do other cases cited in *Guaranty Trust Co.* at page 137.

Whether the United States recognizes the present Government of Cuba in the sense in which the word "recognize" is used in these cases is a question. Diplomatic relations were broken on January 3, 1961 because of the harassments referred to by the President of the United States in the statement quoted *supra* page 10.

For this reason the Court in *Dale Drydock Corp.* v. *M/T Mar Caribe*, 199 F. Supp. 871 (S. D. Texas), held that the Republic of Cuba was unrecognized and that its agencies could not sue in our courts. But the State Department says that it does recognize the Castro Government of Cuba in order to protect our nationals there. Bulletin, vol. 45, page 751. Whether this limited recognition warrants access to our courts we need not consider. It is clear that, irrespective of recognition, comity is not available to petitioner, because, as already shown, there is neither friendliness nor reciprocity between Cuba and the United States.

POINT II.

Although courts will not undo, neither will they enforce, the acts of state of foreign nations.

The present action is an effort by Cuba to enforce its so-called "Resolution No. 1" by which Cuba nationalized the property of corporations in which nationals of the United States had a predominant interest.

Petitioner seeks to support its cause of action by reference to decisions in which the courts have refused to undo acts of state already consummated in foreign countries, e.g., *Oetjen* v. *Central Leather Co.*, 246 U. S. 297.

But such cases are very different from the present, in which another sovereign is seeking to use our courts to enforce its acts of state. This Court made the distinction in *Guaranty Trust Co.* v. *United States*, 304 U. S. 134. Courts do not enforce the public laws of other countries—at least in the absence of an express agreement to do so, and no such agreement exists here.

In short, it is inherent in sovereignty of a given territory, that, in the absence of consent, no other sovereign can enforce manifestations of sovereignty in that territory.

The principle has also been explained, as we show *infra* pages 23-24 and pages 26-28 on the ground of reluctance to reject the claims of foreign sovereigns involving questions of policy.

The principle stated in the point heading has been put by Dicey* as follows:

> "RULE 21. The court has no jurisdiction at common law to entertain an action——
>
> "1. for the enforcement, either directly or indirectly, of a penal, revenue, or other public law of a foreign State; or

* *Conflict of Laws* (7th ed. 1958) 159.

"2. where the grounds of action involve an act of State."

Dicey says in comment (pages 159-160):

> "In accordance with the principle of territorial supremacy, which is fundamental to the community of nations, English courts refuse to enforce any claim which, in their view, is a manifestation of a foreign State's sovereign authority."

Sir Hersh Lauterpacht,* another distinguished writer on international law, has expressed the rule as follows:

> "It follows from the principle of territorial supremacy that States must not perform acts of sovereignty within the territory of other States. For the same reason, while effect is as a rule given to private rights acquired under the legislation of foreign States—a subject which falls within the domain of Private International Law—the courts of many countries, including British and American courts, decline to give effect to the public law, as distinguished from private law, of foreign States. In particular they refuse to enforce foreign revenue laws as well as penal and confiscatory legislation of other States. To enforce them would mean, in effect, to assist States in the performance of acts of sovereignty in derogation of their territorial supremacy."

Perhaps the first full exposition by this Court was in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265. This was an original suit brought to enforce a penalty imposed by Wisconsin for failure to file certain reports required by the statutes of that state.**

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* 1 *Oppenheim, International Law* (8th [Lauterpacht] ed.) 327-330.

** It is true that this Court has somewhat narrowed the opinion in *Wisconsin* as it relates both to judgments and to the duty to

The Court said at page 289:

> "By the law of England and of the United States, the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offences committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country. Wheaton's International Law (8th ed.) §§113, 121.
>
> "Chief Justice Marshall stated the rule in the most condensed form, as an incontrovertible maxim, 'The courts of no country execute the penal laws of another.'" *The Antelope*, 10 Wheat. 66, 123.
>
> "The only cases in which the courts of the United States have entertained suits by a foreign state have been to enforce demands of a strictly civil nature. *The Sapphire*, 11 Wall. 164; *King of Spain* v. *Oliver*, 2 Wash. C. C. 429, Pet C. C. 217, 276. [The Court then analyzed *Sapphire* and *King of Spain*, showing that neither suit had been brought to enforce a sovereign act:] . . .
>
> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties . . .".

The Court then engaged in a painstaking analysis of all suits by states of the United States. It concluded that, apart from the boundary cases, apparently regarded as *sui generis*, all the cases in which relief had been given in courts of the United States were suits in which the state had sued as a private proprietor in suits "of a civil nature," (page 297) rather than as a sovereign.

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each other of the respective states of the United States under the Constitution. *Milwaukee County* v. *White Co.*, 296 U. S. 268. But neither judgments nor the reciprocal obligations of states under the Constitution are involved here.

The whole subject was again reviewed by this Court in the famous case of *Huntington* v. *Attrill*, 146 U. S. 657. In that case a private individual had brought suit in the courts of Maryland to enforce a judgment granted him by the courts of New York. The New York judgment was based on a New York statute permitting victims of a certain type of fraud to recover punitive damages. The courts of Maryland had denied relief on the ground that the judgment had imposed a penalty.

This Court reversed, saying at page 168:

> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts of species: *private wrongs* and *public wrongs*.'"*

Because the New York statute afforded relief to a private person it was, the Court held, remedial and not penal. In short, what the courts will not do is enforce the *public* rights of other states.

The present case is not one in which a law of Cuba provided for individual relief. It is evident from Law No. 851 and Resolution No. 1 that they were adopted to retaliate for what was regarded by their authors as the wrong done Cuba by the reduction in the sugar quota. In other words, their purpose was to redress what was conceived to be a public wrong.

In *Milwaukee County* v. *White Co.*, 296 U. S. 268, this Court held that under the Constitution a state court judgment for taxes was entitled to full faith and credit in the courts of other states, but said: "Whether one state must

* Emphasis in original.

enforce the revenue laws of another remains an open question in the Court" (page 275).

Federal lower courts and state courts have often refused to entertain suits brought by other states to recover taxes. Several of these decisions are cited at 296 U. S. 274. A leading case so holding is *Moore* v. *Mitchell*, 30 F. 2d 600 (C. A. 2d), affirmed on other grounds at 281 U. S. 18.

In *Moore* v. *Mitchell*, an official of a county of Indiana had brought suit against executors to enforce a claim for delinquent taxes owed by the decedent. Denying relief, the Court said at page 602:

> "Taxes are imposts, not debts, collected for the support of the government . . . The enforcement of revenue law rests, not on consent, but on force and authority . . . With the appellees and the property without the state, and the estate being administered in New York, the effort to collect a tax, for a political subdivision of Indiana, is repugnant to the settled principles of private international law, which preclude one state from acting as a collector of taxes for a sister state, and from enforcing its penal or revenue laws as such."

In a concurring opinion Judge Learned Hand rationalized the doctrine in language that has been widely quoted, 30 F. 2d 604:

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it

> will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

In England the rule was first laid down in *Folliott* v. *Ogden*, (1789), 1 H. Bl. 124, 135, that the English courts would not enforce the penal laws of other countries. The doctrine was restated and redefined in *Huntington* v. *Attrill*, [1893] A. C. 150, 156, another suit in the same litigation in which this Court decided the case of the same name, and indeed this Court cited with approval the decision of the Privy Council, 146 U. S. 672.

The early case of *Don Alonso* v. *Cornero*, Hob. 212, resembles the present. The Spanish State confiscated three thousand pounds of tobacco belonging to respondent, but failed to reduce the confiscation to possession. Respondent surreptitiously removed the tobacco to England. The Spanish Ambassador libelled the tobacco in admiralty, but the Court denied relief.

Commenting on questions raised by such factual situations, Dicey says at page 163:

> ". . . [I]t is conceived that the latter [foreign State] has a valid but unenforceable title: valid because the property was situate within its jurisdiction at the appropriate time, but unenforceable because the court has no jurisdiction to countenance a claim by the foreign State based upon an exercise of its sovereign power."

Banco de Vizcaya v. *Don Alfonso de Borbon y Austria*, [1935] 1 K. B. 140, is also in point.

The suit was brought by the Banco de Vizcaya for the benefit of the Spanish Republic against the Westminster Bank, Ltd. to recover certain bonds. The bonds had been deposited by the Banco de Vizcaya and were held by the Westminster Bank, Ltd. to its order. The Banco de Vizcaya had made this deposit pursuant to defendant's instruction given when he was King of Spain, the bonds then being his private property. Subsequently the Spanish Republic confiscated defendant's property.

The Westminster Bank impleaded the defendant.

The Banco de Vizcaya was thus merely asking for the enforcement of its rights according to the Westminister Bank's records.

Recognizing, however, that to compel the Westminster Bank to deliver the bonds to the Banco de Vizcaya would, under the circumstances then existing, effectuate the confiscation of the former King's property, and thereby enforce a penal law, the Court found for the defendant.

The British courts have been similarly unwilling to enforce the revenue laws of other states, regarding them as penal in nature.

In *Attorney-General for Canada* v. *William Schulze & Co.*, (1901) 9 S. L. T. 4, the Scottish Court refused to

enforce a judgment for costs rendered in a Canadian court in a suit to condemn certain property because it had been imported in violation of the customs laws. Denying relief, the Court said, "Accordingly the suit was truly a Revenue suit; that is to say, in the sense of the international rule it was a penal suit." (page 5)

Re Visser, Queen of Holland v. *Drukker*, [1928] 1 Ch. 878, was a suit to collect Dutch death duties from the administrator of a deceased domiciliary of the Netherlands. Denying relief, the Court said (page 884):

> "My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts, under which these courts [English Courts] will not collect the taxes of foreign states for the benefit of the sovereigns of those foreign states; and this is one of those actions which these courts will not entertain."

A very illuminating opinion was delivered by Kingswell Moore, J., in *Peter Buchanan, Ltd. and Marcharg* v. *McVey*, [1955] A. C. 516, sitting in the High Court of Ireland. In that case the defendant, sole stockholder of the plaintiff Scottish corporation, found the corporation confronted with a Scottish tax of over £300,000. He did not want to pay it. "He evolved a plan both swift and simple. He would secretly dispose of all the valuable whiskey stocks [whiskey being the sole asset of the corporation] scraped together with his private assets to safe hands in Ireland, and in due time follow his money to this jurisdiction from where, he was advised, he might safely snap his fingers in the face of a disgruntled Scottish Revenue." (page 517).

This plan defendant carried out. Subsequently, at the instance of the Scottish Revenue, plaintiff Marcharg was appointed liquidator of the corporation. The corporation

and the liquidator brought suit to recover the corporate assets.

Passages from Justice Moore's opinion are so much in point that we quote at length (pages 528-529):

> "In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered 'the proper law' of the contract will not be enforced if in the view of the court they are tainted with immorality of one kind and another. Delicts committed abroad are not actionable here unless they are torts by our law. Slavery, or any other status involving penal or private disabilities, is not recognized. If, then, in disputes between private citizens, it has been considered necessaary to reserve an option to reject foreign law as incompatible with the views of the community, it must have been equally, if not more, necessary to reserve a similar option where an attempt was made to enforce the governmental claims (including revenue claims) of a foreign State. But if the courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of selection would have been one not only of difficulty but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications. Neither common morality nor 'settled public policy' would have sufficed to cover the area of necessary rejection; for the nature and incidence of governmental and revenue claims are not dictated by any moral principles but are the offspring of political

considerations and political necessity. Taxation originally expressed only the will of the despot, enforceable by torture, slavery and death. Though it may be conceded that in modern times it is more often designed to further a benevolent social policy, and that the civil servant has usurped the position of the executioner as the agent of enforcement, yet in essence taxation is still arbitrary and depends for its effectiveness only on the executive power of the State. Nor is modern history without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighbouring communities but would run counter to their political aims and vital interests. Such laws have been used for religious and racial discriminations, for the furtherance of social policies and ideals dangerous to the security of adjacent countries, and for the direct furtherance of economic warfare. So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance.

"If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected."

The Supreme Court of Ireland affirmed this decision, [1955] A. C. 530.

UNITED STATES v. PINK, 315 U. S. 203, AND UNITED STATES v. BELMONT, 301 U. S. 324, ARE NOT TO THE CONTRARY.

In *United States* v. *Pink* and *United States* v. *Belmont*, this Court did, it is true, enforce claims based in a sense on the confiscatory decree of a foreign power.

The judgment of this Court in *United States* v. *Pink* disposed of a fund representing assets of a private corporation of the Russian Empire, nationalized by Soviet decree. However, the suit was brought by the United States pursuant to a valid executive agreement with the Soviet Union made at the time of, and incident to its recognition. The collection sought in *United States* v. *Pink* was for the benefit of nationals of the United States. No national of the United States had any claim against the fund, all such claims having been already paid. Hence only the surplus above such claims was in dispute.

Beneficially, the controversy was between United States nationals represented by their Government, and certain other claimants who were neither of United States nor of Russian nationality, 315 U. S. 226-227.

Moreover, as of that time, the Soviet Union was not unfriendly. The case was argued in this Court eight days after Pearl Harbor. The United States and the Soviet Union were then allies fighting a major war. The opinion of the Court emphasized the propriety of encouraging friendly relations under such circumstances, 315 U. S. 231-233.

The essential distinction between this case and *United States* v. *Pink* is that in the latter case there was a valid executive agreement between the United States and the Soviet Union by which the suit was authorized and an overriding federal policy established.

The contrast with the nature of the present suit and the relations with the foreign country here involved is obvious.

United States v. *Belmont* does not require separate discussion.

THE FORUM SHOULD APPLY ITS OWN LAW WHEN A FOREIGN SOVEREIGN SEEKS TO ENFORCE AN ACT OF STATE.

At pages 22-24 the Government argues that it should make no difference in the application of the act of state doctrine that "In this case the parties are reversed" (page 23).

This is, we submit, a breath-taking argument, contrary to all the law on the subject. Significantly, the Government does not cite a single judicial decision or treatise to support this contention. More specifically, the Government does not cite any case in which a sovereign was able to enforce an act of state, or a transaction resting on an act of state, in the courts of another sovereign.

In *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, this Court considered the applicability of the statute of limitations to a claim of the Russian Government assigned to the United States by the "Litvinov Assignment". Holding the statute applicable the Court said at page 134:

> "But very different considerations apply where the foreign sovereign avails itself of the privilege, likewise extended by comity, of suing in our courts. [citations] By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought."

In *National City Bank* v. *Republic of China*, 348 U. S. 356, this Court held that in a suit brought by a foreign sovereign the defendant might counterclaim. The Court said at pages 361-362:

> "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice."

The Court held that China was *not* entitled to "our law free from the claims of justice".

In Point III *infra* we establish the right of the forum to deny relief contrary to its policy. In the cases cited *supra* we note that this right has been suggested as a reason for the refusal to entertain the claims of foreign sovereigns insofar as based on public law. The Government's argument would appear to deny this right.

The remarks of Justice Moore in *Peter Buchanan, Ltd., supra* pages 26-28, referring to the sinister nature and horrifying effects of some official edicts are relevant. Unfortunately Justice Moore is not speaking of the remote past. We submit that an enlightened forum should in the present day be most alert to retain its rights.

The Government brief in these pages seems to suggest that there has been a lack of commercial morality on the part of Farr, Whitlock, and that to find relevance in the fact that "the parties are reversed" would "encourage" "the private use of force and deception" (page 24).

There are several answers to this suggestion, if in fact it is made.

First, the issue in this case as presented by petitioner is clearly the effect to be given by the courts of the United States to Cuba's confiscatory decree. Petitioner so cast its complaint, and its statement of the "fundamental question" and its argument in its Brief in this Court. Conceivably petitioner might have sued, or directed Societe Generale to sue, simply on the contracts and the bills of

lading. But petitioner's counsel undoubtedly realized that the courts would scrutinize the circumstances as was done in *Peter Buchanan, Ltd.* and *Banco de Vizcaya.* In neither of these cases did plaintiffs purport to enforce a public law.

Second, the effect of oppression, in history ancient and modern alike, has been to encourage secret and surreptitious behavior. The victims of tyrants are not expected to respond with candor, and are not condemned when they do not.

In this case confiscations against which the Government at the time made "indignant protest" as violations of international law threatened Farr, Whitlock with bankruptcy and forced a possible breach of a contract with the wrongdoer.

Now, with strange inconsistency, the Government appears to condemn Farr, Whitlock and wants the wrongdoer to get judgment. Indeed, the Government's argument on this phase of the case amounts to little more than expressions of anxiety lest confiscating governments may not readily realize on their exactions.

When Cuba sold the sugar to a New York purchaser upon the basis of an executory contract to be performed in New York it assumed the risk that it would not be able to enforce that contract according to the law and policy of New York and of the United States.

We submit that long established doctrines of the right of the forum to apply its own law and policy should not be overturned in order that confiscated property may be more conveniently disposed of.

POINT III.

The contracts of August 11, 1960 are not enforceable under New York law because (1) they effectuate a confiscatory decree and (2) that decree violates international law.

In diversity cases the federal courts must follow the law of the state in which they sit, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, including the rules of that state applicable to conflict of laws, *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487.

Essentially what plaintiff seeks to do here is to enforce the contracts wrung from Farr, Whitlock on August 11, 1960 by the confiscatory decree and Cuba's procedure under it. The place of performance, that is to say, the place where Farr, Whitlock was to make payment, was New York. It is "rudimentary" that a state "will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or in other words violate the public policy of the State where enforcement of the foreign contract is sought." *Bond* v. *Hume*, 243 U. S. 15, 21.

> "Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned; but that principle excepts claimed rights so contrary to the law of the forum as to subvert the forum's view of public policy." *Griffin* v. *McCoach*, 313 U. S. 498, 506.

There can be no doubt that confiscation is offensive to the public policy of New York.

In *Vladikavkavsky R. Co.* v. *New York Trust Co.*, 263 N. Y. 369 (decided in 1934, after the recognition of the

Soviet Union in 1933), the New York Court of Appeals said at pages 378-379:

> "It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. *Baglin* v. *Cusenier*, 221 U. S. 580)".

A state may not, of course, enforce a public policy inconsistent with that of the Federal Government. That was the decision in *United States* v. *Pink*, 315 U. S. 203, 230-231:

> "But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. See *Nielsen* v. *Johnson*, 279 U. S. 47. Then, the power of a state to refuse enforcement of rights based on a foreign law which runs counter to the public policy of the forum (*Griffin* v. *McCoach*, 313 U. S. 498, 506) must give way before the superior Federal policy evidenced by a treaty or international compact or agreement."

In the present situation there is, however, no treaty or international compact or agreement overruling the policy of the State of New York.

International law. ". . . International law is a part of our law and as such is the law of all States of the Union (*The Paquete Habana*, 175 U. S. 677, 700) . . ." *Sl iotes* v. *Florida*, 313 U. S. 69, 72.

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right

depending upon it are duly presented for their determination" *The Paquete Habana*, 175 U. S. 677, 700.

There are many other court decisions containing statements to the same effect. *Riddell* v. *Fuhrman*, 233 Mass. 69; *Peters* v. *McKay*, 195 Or. 412; *United States* v. *Melekh*, 190 F. Supp. 67 (S. D. N. Y.) are a few.

The brief of C. A. V. and the *amici curiae* briefs of the Association of the Bar of the City of New York and of the American Bar Association establish fully that the Cuban edicts violate international law.

POINT IV.

Under the law of New York petitioner's claim is on the contract and not for conversion.

Paragraph 12 of the complaint alleges that Farr, Whitlock's conduct was "contrary to the laws of the State of New York; such action by Farr, Whitlock & Co. amounted to illegal conversion by it of said bills of lading and of said fund of $175,250.69 received by it for the account of plaintiff". R. 8.

What happened here was that, pursuant to the contracts between the parties, petitioner's agent, Societe Generale, delivered the bills of lading to Farr, Whitlock. Farr, Whitlock disposed of the bills of lading and refused to account for the proceeds to Societe Generale or otherwise pay for the sugar covered by the bills.

It is significant that despite the allegations of paragraph 12 petitioner does not present any argument that these facts constitute conversion under New York law.

The New York cases are abundantly clear that the recipient of property, who is authorized by contract express or implied to dispose of that property, does not convert, but commits a breach of contract only, when he

disposes of the property contrary to the terms of the contract. The conduct of the defendants in the following cases was held to constitute breach of contract and not conversion: *Walter* v. *Bennett*, 16 N. Y. 250 (agent received draft for goods sold, but refused to deliver it or its proceeds to principal); *Industrial & General Trust* v. *Tod*, 170 N. Y. 233 (railroad reorganization committee used bonds contrary to agreement); *Hutchings* v. *Torrey*, 203 Misc. 1038 (Sup. Ct. Broome) (plaintiff lent defendant $10,000 under agreement that it be used for a specified purpose; defendant used it for another purpose).

In *Industrial & General Trust* the Court of Appeals said at page 245:

> "'Conversion at law is defined to be 'an unauthorized assumption and exercise of the right of ownership over goods, or personal chattels, belonging to another, to the alteration of their condition, or the exclusion of the owner's rights.' (Bouvier's Law Dict.) . . . If, in the present case, the defendants were shown to have altered the condition of the plaintiff's property, *without authority** they might be liable in conversion. . . . The pivotal point is, whether the defendants exceeded their powers and committed a legal tort; or whether they committed a mere breach of their agreement, in the particular claimed. Their relation to the plaintiff rested in contract and, as it was said in *Walter* v. *Bennett*, (16 N. Y. 250), 'whatever responsibility attaches * * * is upon the contract and the plaintiff cannot, by changing the form of his action, change the nature of the defendant's obligation and convert that into a tort, which the law deems to be a simple breach of an agreement.' The defendants did not part with the bonds in a way, and for a purpose, not within their authority; . . . It might be assumed that they

* Emphasis in original.

exceeded their instructions, in the order of their precedure under the agreement; but that is not enough."

CONCLUSION.

The judgment should be affirmed.

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September 30, 1963

APPENDIX A.

United States Foreign Policy Toward the Republic of Cuba.

The Bulletin referred to below is the Bulletin of the Department of State.

The Bulletin of January 22, 1962, entitled "The Castro Regime in Cuba", summarized in part a document issued on January 3, 1962 as follows (vol. 46, page 129):

> "From the time the Castro regime came to power on January 1, 1959 it has deliberately tried to undermine established governments in Latin America and destroy the inter-American system. In the process it has associated itself with the Sino-Soviet bloc in an active partnership and adopted totalitarian policies and techniques to cement dictatorial control over the Cuban people. This situation confronts the nations of the Western Hemisphere with a grave and urgent challenge."

One of the particulars of this challenge was stated by Secretary of State Rusk at his news conference of February 1, 1962 in the following disclosure (Bulletin of February 19, 1962, vol. 46, page 288):

> ". . . We know from highly reliable intelligence sources that dollars and foreign exchange are being used by the Castro government to promote subversion in other countries, . . ."

Edwin M. Martin, Assistant Secretary for Inter-American Affairs, later elaborated (Bulletin of March 11, 1963, vol. 48, page 350):

> "Another form of support of subversive activities—and one which is difficult to trace—is the furnishing of funds to subversive groups. Castro reportedly donated recently $15,000 to a violent, extremist group in Columbia called the United Front

for Revolutionary Action. The Cuban Government has also given financial aid to the leftist subversive activities of the pro-Castro Revolutionary Union of Ecuadorian Youth (URJE), which has been involved in guerrilla activities in Ecuador. The Quito radio on January 29 broadcast a letter sent to them by Pablo Paez, a young member of URJE who had recently been expelled from the group, in which he publicly acknowledged that two other individuals of the group, whom he named, made several trips to Cuba and returned with money for the support of the Ecuadorian guerrilla movement. One of these same individuals, he said, also received funds directly from the Cuban Embassy at Quito."

Assistant Secretary Martin further indicated at page 351 the direction that Castro-inspired subversion was taking:

"In the aftermath of the Cuban crisis, the Castro regime has shifted the emphasis of its campaign in Latin America to one of open encouragement of terror as a principal weapon, a move dictated by the loss of popular support as a result of the crisis and the futility of continuing popular-front, mass-movement tactics. Violence has been the only refuge of the very small minority throughout history."

In the United Nations, these tactics were continued verbally, as Ambassador Stevenson pointed out on February 14 in the General Assembly, rejecting Cuban charges against the United States (Bulletin of April 2, 1962, vol. 46, page 553):

"... Could anything be more disharmonizing than the unbridled vituperation to which we have been subjected by the Castro delegation and its Communist colleagues? That charges of aggression and intervention—unsupported by evidence and squarely denied—can be dredged up, lying dormant for 6 months, and be solemnly paraded for 10 days before

the representatives of 104 nations cannot enhance the reputation of this organization for seriousness or efficiency."

Ambassador Stevenson then made reference to particular Cuban-Communist activities in our hemisphere:

> "The Cuban regime is flooding the hemisphere with propaganda and with printed material. The recent inauguration of a powerful shortwave station in Cuba now enables the regime to broadcast its propaganda to every corner of the hemisphere, and these broadcasts have not hesitated to call for the violent overthrow of established governments." (vol. 46, page 554)

The denunciations by the Castro Government of course continued, as indicated by the reply of the United States to charges made by the President of Cuba (Statement by Adlai E. Stevenson, United States Representative to the United Nations General Assembly, regarding charges made against the United States in plenary session by President Oswaldo Dorticas Toriado of Cuba. U. S. Delegation Press Release, dated October 8, 1962, vol. 47, page 706, Bulletin of March 5, 1962):

> "But the President of Cuba, Mr. President, speaking as chief of state on a ceremonial occasion, has seen fit to use this rostrum to attack my country with unparalleled calumnies, slanders, and misrepresentations for 1 hour and 45 minutes."

By October 1962, the United States could be considered safe from the threat of force by Cuba according to the President of the United States.

"The Soviet Threat to the Americas", an address by President Kennedy, on October 20, 1962 (Bulletin of November 12, 1962, vol. 47, pages 715-16):

> "This urgent transformation of Cuba into an important strategic base—by the presence of these

large, long-range, and clearly offensive weapons of sudden mass destruction—constitutes an explicit threat to the peace and security of all the Americas, in flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this nation and hemisphere, the Joint Resolution of the 87th Congress, the Charter of the United Nations, and my own public warnings to the Soviets on September 4 and 13.

"But this secret, swift, and extraordinary build-up of Communist missiles—in an area well known to have a special and historical relationship to the United States and the nations of the Western Hemisphere, in violation of Soviet assurances, and in defiance of American and hemispheric policy—this sudden, clandestine decision to station strategic weapons for the first time outside of Soviet soil—is a deliberately provocative and unjustified change in the *status quo* which cannot be accepted by this country if our courage and our commitments are ever to be trusted again by either friend or foe."

The seeming political solution of the October crisis did not divert in the slightest the course of the Castro Government, according to the following statement of Ambassador De Lesseps Morrison (Bulletin of February 18, 1963, vol. 48, page 263):

"On January 16, 1963, Prime Minister Fidel Castro in a speech at the closing session of the Congress of Women of the Americas made a major policy statement, further defining the Cuban Government's position of encouragement and support for armed insurrection in other countries of the hemisphere. *The statement constitutes a declaration of war against the hemisphere.*"

The response of the United States has been aptly summarized by Assistant Secretary Martin (Bulletin of June 24, 1963, vol. 48—U. S. Outlines Policy Toward Cuban Refugees, statement by Edward M. Martin, Assistant Secretary for Inter-American Affairs, pages 988-89, made before the

Sub-Committee on Refugees & Escapees of the Senate Committee on the Judiciary, on March 22):

"U. S. Policy Toward Cuba:

In moving to a brief outline of our present Cuban policy I wish to express it in terms related to some of the arguments raised by the exiles. It is *not** coexistence. We want to get rid of Castro and Communist influence in Cuba. It is *not* passive. We are engaged in a variety of measures, unilateral, bilateral, and multilateral, which are designed to increase the isolation of Castro; to increase his serious economic difficulties; to prevent by military means, if necessary, any export of aggression from Cuba; to thwart Cuban-based and -supported subversion of Latin American governments; to increase the costs to the Soviets of their maintenance of Castro; to persuade the Soviets that they are backing a losing and expensive horse; to effect the withdrawal of Soviet military forces in Cuba; and to maintain surveillance of Cuba to insure that it does not again become a military threat to the United States or its allies in this hemisphere."

On February 3, 1962, the President of the United States proclaimed an embargo on exports to Cuba. The first recital of that proclamation was as follows (Bulletin of February 19, 1962, vol. 46, pages 283-284):

PROCLAMATION 3447

Embargo on All Trade With Cuba

"WHEREAS the Eighth Meeting of Consultation of Ministers of Foreign Affairs, Serving as Organ of Consultation in Application of the Inter-American Treaty system; and, in light of the subversive offensive of Sino-Soviet communism with which the Government of Cuba is publicly aligned, urged the mem-

* Emphasis in original.

ber states to take those steps that may consider appropriate for their individual and collective self-defense; . . . ."

The determination of the United States to isolate Cuban influence in our hemisphere was formally reaffirmed by the Congress of the United States in September of 1962:

> *"RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States is determined——*
>
> (a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere;
>
> (b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and
>
> (c) to work with the Organization of American States and with freedom-loving Cubans to support the aspirations of the Cuban people for self-determination." (Bulletin of Oct. 22, 1962, vol. 47, page 597)

Ambassador Stevenson dismissed the Cuban denunciations of this policy in the following statement:

> "There was incessant talk this morning about economic strangulation and economic blockade. Neither of these terms has any application to this case. The current regime in Cuba has pronounced its intention to overthrow other governments in this hemisphere. Could anyone, therefore, take part in any trade, or aid trade designed to boost the Cuban economy and to arm its military services?"

(Bulletin of November 5, 1962, vol. 47, page 707, Delegation Press Release dated October 8, 1962.)

President Kennedy, shortly before the crisis of October, 1962, stated with satisfaction the results of our Cuban economic policy (Bulletin of October 1, 1962, vol. 47, page 481):

> "By his [Castro's] own monumental economic mismanagement, supplemented by our refusal to trade with him, his economy has crumbled and his pledges for economic progress have been discarded, along with his pledges for political freedom. His industries are stagnating, his harvests are declining, his own followers are beginning to see that their revolution has been betrayed."

Secretary of State Rusk, in his address of March 12 to the Advertising Council, has provided a more recent estimation of the present and prospective results of this policy (Bulletin of April 1, 1963, vol. 48, page 470):

> "• • • And so there has been a systematic discussion with other governments about the restriction of trade between the free world and Cuba and about the restriction of shipping between the free world and Cuba.
>
> "The statistics on both of those show a dramatic decline in the economic relationships between Cuba and the rest of the free world. I think we will find that 1963 will almost surely result in almost complete isolation of Cuba from the free world in such transactions."

The Secretary added, however, a caveat as to the flow of funds:

> "• • • Then we have the continued problem of the degree of penetration of the rest of the hemisphere coming through Cuba or leaning upon Cuba in terms of subversive effort, *the flow of funds*,* the

* Emphasis in original.

training of individuals from other countries in Cuba to be returned for nefarious purposes back to their own country."

APPENDIX B

"Address Official Communications to
THE SECRETARY OF STATE
Washington 25, D. C.

DEPARTMENT OF STATE
Washington

(L.S.) Department of State April 22, 1963

Dear Judge Ruiz-Nazario:

This is with further reference to your letter of November 14, and our reply of December 6, 1962, concerning the case of *Banco para el Comercio Exterior de Cuba* v. *P. & E. Shipping Corporation*. The Department has now received a reply from the Embassy of Switzerland at Havana in response to this Department's inquiry as to Banco's relationship with the Cuban Government and whether the United States or a national thereof would be allowed to maintain an action, similar to the one involved in the case cited in the courts of Cuba.

It appears that under Law 891 of October 13, 1960, published in the Official Gazette of Cuba of the same day, all private banking concerns in Cuba were expropriated by the State, the functions peculiar to banks thereby becoming the exclusive function of the State through agencies established for that purpose. Law 930 of February 23, 1961, on the organization of the Banco Nacional stipulated its international and foreign trade functions and operations, vesting all powers relating to such operations exclusively in the said bank. Special provision 3 dissolved the government autonomous foreign trade credit agency known as the Banco para el Comercio Exterior de Cuba. Special provision 5 legally empowered the Banco Nacional to continue the affairs of the

state banks and nationalized private banks; it is understood to replace the said incorporated institutions with respect to all their property and rights and all obligations concerned in their banking business. Accordingly, it appears that the Banco para el Comercio Exterior de Cuba has been dissolved and its functions assumed by the Banco Nacional, an entity of the Government of Cuba.

The Department is further informed that in Cuba, in cases of non-fulfillment of an obligation, the injured party may bring legal proceedings, no special provisions establishing differences by reason of nationality or citizenship being stated in the laws. It appears that due to the reticence of lawyers now practicing in Havana to give any information which could be considered prejudicial to the regime in power, it was not possible to obtain legal opinion from Cuban lawyers on whether a United States citizen would, in fact be allowed to bring suit in a Cuban court.

If the Court's inquiry is made with a view to determining whether, in fact, there exists in Cuba effective judicial remedies for aggrieved United States nationals, it may be pertinent to note that, in connection with claims of United States nationals against Cuba, the Department of State no longer requires that the aggrieved United States national show, as a prerequisite to consideration of espousal of his claim by the United States, that he has exhausted local legal remedies in Cuba. This policy is based on the Department's conclusion that owing to the breakdown of the Cuban judiciary as an independent branch of the Government and its subservience to the political policies of the executive even if local legal remedies theoretically exist under Cuban law, recourse to them by an aggrieved United States national would be futile. If this question is pertinent to the case, it could presumably be resolved by the Court on the basis of evidence submitted to it.

Sincerely yours,

For the Secretary of State

(signed) RICHARD D. KEARNEY
RICHARD D. KEARNEY
Acting Legal Advisor".